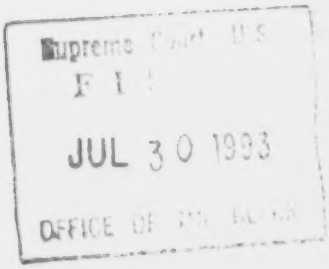
No. 93-17

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993



PIPER AIRCRAFT CORPORATION,
Petitioner,
v.
EDWARD CHARLES CLEVELAND,
BY AND THROUGH THE CONSERVATOR
OF HIS ESTATE, KATHLEEN CLEVELAND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Federal Aviation Act of 1958 preempt a federal court from awarding compensatory damages to a severely injured aircraft accident victim whose only recognized remedy against the manufacturer of the small or "general aviation" aircraft which injured him is an action based on state negligence law where:

a) the sole provision of the Act entitled "federal preemption" only "relates to" the "rates, routes, or services" of "any air carrier . . . provid[ing] air transportation" (defined as a domestic airline in interstate commerce), facts not in issue, and

b) the Act expressly supplements state "remedies now existing at common law or by statute" and no evidence exists that Congress intended to deprive aircraft accident victims of their only remedy when it amended the Act to deregulate airline economics?

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STATUTES

The full text of the key provisions of the Federal Aviation Administration Act of 1958, 49 U.S.C. App. § 1305(a)(1) (1984) ("federal preemption") and 49 U.S.C. App. § 1506 (1958) ("remedies not exclusive"), appear in the Appendix.

STATEMENT

The Aircraft Accident On The Uncontrolled Private Ground

Edward Charles Cleveland suffered massive head injuries and permanent brain damage, on July 7, 1983, when the Piper aircraft he piloted collided with an unseen van as the aircraft began its take-off roll at Mid-Valley Airpark, Los Lunas, New Mexico. Ptn. App. 46a. Thus, Mr. Cleveland's accident occurred, not in federal airspace, but rather *on the ground*, not on federal land or under federal airtraffic control, but rather *at an uncontrolled, privately-owned airport.*

Part of an aircraft is its owner's handbook. *Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301, 1306 (D.C. Cir. 1983). Piper's Owner's Handbook touted "*solo . . . rear seat operation is entirely feasible*," gave instructions for removing the front seat, and promoted use of Piper's aircraft "*[f]or special purpose flights, such as photography.*" Ptn. App. 73a. Instead of specially inviting solo flight from the rear pilot's seat, Piper's Owner's Handbook should have warned: "Center of gravity now permits this aircraft to be flown solo from the front pilot's seat; DO NOT FLY SOLO FROM THE REAR SEAT — VISIBILITY IS INADEQUATE."

A lap belt restrained Mr. Cleveland during the head-on collision but, because Piper did not provide a complete rear pilot's seat shoulder harness, his head hit the camera mount installed where the front seat had been. Ptn. App. 5a, 68a, 78a, 48a-50a n.2. Mr. Mudd (a designated FAA airframe and powerplant inspector), *not Mr. Cleveland*, inspected the camera and its mount after it was installed and Mr. Mudd, *not Mr. Cleveland*, was legally responsible for overseeing and approving that substitution of the camera and its mount for the front seat. Ptn. App. 4a, 46a; 14 C.F.R. §§ 43.3 & 43.5 (1982); *contra* Ptn. 2, 9 n.7.

Having encouraged both photography and rear seat solo flight, Piper should have provided the inexpensive strapping required to complete the rear pilot's seat shoulder harness. Ptn. App. 48a. On July 28, 1983, just fourteen days after this accident, Piper *unilaterally, without any further approval from the FAA,* issued a

Service Bulletin requiring all of its PA-18-150 aircraft built before September 30, 1982 (*including the accident aircraft*) to be retrofitted with rear pilot's seat shoulder harnesses! Ptn. 11; *contra* Ptn. 23.

Unanimous Affirmance Below

This is *not* a strict liability case. New Mexico law only permits crashworthiness claims based on common law negligence. Ptn. App. 56a n.7. This is *not* a joint liability case. New Mexico law only permits imposition of several liability. Ptn. App. 54a.

Undercutting its current claims, Piper did not raise federal preemption as an affirmative defense until *after* the first appeal. *Accord*, Ptn. 13; Ptn. App. 3a, 31a.

Piper then moved for summary judgment on its federal preemption defense. The district court, without ruling on the admissibility of Piper's affidavits (Ptn. App. 32a), unequivocally denied Piper's motion based on both controlling law and Piper's failure to show that no triable issues of material fact remained to be tried. Ptn. App. 29a-40a. **"The issue of whether Piper violated any federal standard here appears to be an unresolved question of fact."** Ptn. App. 37a; *contra* Ptn. 22-25. The Court of Appeals' panel (including Senior Circuit Judges from both the Tenth and the Eighth Circuits) *unanimously* affirmed. Ptn. App. 2a-25a. When Piper petitioned for rehearing and suggested rehearing in banc, the Court of Appeals *unanimously* rejected Piper's request. Ptn. App. 28a.

REASONS FOR DENYING THE PETITION

The petition should be denied because it does not present the "special and important reasons" for review required by S. Ct. R. 10 (1990). "This case arises from a bizarre set of facts." Ptn. App. 46a; Ptn. 2. No conflict exists between the Tenth Circuit and any other circuit or any state court of last resort or this Court. The question presented does not otherwise warrant review.

I.

MORALES V. TRANS WORLD AIRLINES, INC., THIS COURT'S MOST RECENT CASE CONCERNING "THE FEDERAL REGULATORY SCHEME IN QUESTION," SUPPORTS THE UNANIMOUS AFFIRMANCE BELOW.

In the area of preemption, "each case turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973). The Federal Aviation Act, 49 U.S.C. App. § 1301 et seq. (1958, as amended), contains only one provision entitled "federal preemption," 49 U.S.C. App. § 1305 (1978, as amended). Piper does not claim otherwise. Ptn. 15; Ptn. App. 10a, 31a-32a.

Last Term, in *Morales v. Trans World Airlines, Inc.*, 119 L.Ed.2d 157, 163 (1992), this Court considered whether the amendment to the Federal Aviation Act of 1958 which added 49 U.S.C. App. § 1305, the Airline Deregulation Act of 1978, "pre-empts the States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes." This Court held "that the fare advertising provisions of the NAAG guidelines are pre-empted by the ADA." *Morales*, 119 L.Ed.2d 172. In so doing, this Court considered the plain meaning of 49 U.S.C. App. § 1305 (1978, as amended) and Congress' intent in enacting it.

"Section 1305(a)(1) expressly pre-empts the States from 'enact[ing] or enforc[ing] any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . . {provid[ing] air transportation}.' " *Morales*, 119 L.Ed.2d 167 ({ } added). Piper is an aircraft manufacturer and Mr. Cleveland is a general aviation aircraft pilot and accident victim; neither one is an "air carrier . . . provid[ing] air transportation" as defined by 49 U.S.C. § 1301(3)&(10) (1958). No matter how broad the phrase "relating to" may be, Mr. Cleveland's action against Piper seeking compensatory damages based on products liability negligence theories under state law is *not* "relat[ed] to rates, routes, or services of any air carrier . . . provid[ing] air transportation."

Congress enacted 49 U.S.C. § 1305 "[t]o ensure that the States would not undo federal deregulation with regulation of their own . . ." (*Morales*, 119 L.Ed.2d 164) thereby giving air carriers the freedom to choose which routes to fly, what fares to charge, and what services to offer. Permitting Mr. Cleveland's action for compensatory damages against Piper to proceed based on state law negligence theories implicates none of those concerns.

Moreover, no other conflict exists between this federal statute and compensatory damages awarded under state law. The Federal Aviation Act of 1958 contains no provision permitting any federal agency to compensate aircraft accident victims. *Pinehurst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F. Supp. 543, 548-549 (M.D.N.C. 1979); 49 U.S.C. App. § 1482(c) (1980). To date, the federal courts have repeatedly refused to imply one. *Kodish v. United Airlines, Inc.*, 628 F.2d 1301 (10th Cir. 1980); *McCord v. Dixie Aviation Corp.*, 450 F.2d 1129, 1131 (10th Cir. 1971); Ptn. App. 8a, 35a. Piper is trying to do in this Court what it could not do in Congress — eliminate all compensation for general aviation aircraft accident victims.

II.

CIPOLLONE V. LIGGETT GROUP, A CASE DEFINING THE SCOPE OF EXPRESS PREEMPTION OF STATE TORT ACTIONS IN ANOTHER HIGHLY REGULATED AREA, ALSO SUPPORTS THE UNANIMOUS AFFIRMANCE BELOW.

Last Term in *Cipollone v. Liggett Group, Inc.*, 120 L.Ed.2d 407, 423 (1992) this Court stated: "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Accord, Cipollone*, 120 L.Ed.2d 433. As this Court stated in *Morales*, 119 L.Ed.2d 171: "In concluding that the NAAG fare advertising guidelines are pre-empted, we do not . . . set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines." As this Court further stated after citing state obscenity laws: " '[t]he present litigation plainly does

not present a borderline question and we express no views about where it would be appropriate to draw the line.' " *Morales*, 119 L.Ed.2d 172.

"Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' " *Cipollone*, 120 L.Ed.2d 422 (1992) *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Moreover, the Federal Aviation Act of 1958 contains a savings clause, 49 U.S.C. App. § 1506 (1958) ("remedies not exclusive"), which this Court described as "a relic of the . . . no pre-emption regime." *Morales*, 119 L.Ed.2d 168; *contra* Ptn. 20. Not being superseded by the specific federal pre-emption provision, its plain meaning is also pertinent.

> "While federal regulation of air travel is extensive, it is not exclusive. Quite the contrary, federal law specifically preserves legal remedies for air travelers beyond those set forth in the Federal Aviation Act. . . . the statutory scheme established by the Federal Aviation Act is designed merely to compliment existing statutory and common law remedies, not to supplant them."

Brunwasser v. Trans World Airlines, Inc., 541 F. Supp. 1338, 1345 (W.D. Pa. 1982). Thus, "the doctrine of federal pre-emption of aviation law does not generally extend to tort liability." *Alaska Airlines, Inc. v. Sweat*, 568 P.2d 916, 927 (Alaska 1977).

State law has always governed aviation accidents. A.F. Lowenfeld, *Aviation Law* (2d ed. 1981) § 1.31; *contra* Ptn. 18, 19, 19 n.19. "None of this was inevitable. Compensation for aviation accidents, could, for instance, have been governed by federal law, as are virtually all other aspects of commercial aviation in the United States." A.F. Lowenfeld, *Aviation Law* (2d ed. 1981) § 1.31 at pp. 6-7. Congress, however, chose to retain state tort law compensation for aviation accidents. 49 U.S.C. App. § 1506 (1958).

A manufacturer's common law liability for the design and manufacture of its product dates back to 1916. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *contra*

Ptn. 19 n.19. Federal and state courts have always permitted plaintiffs to pursue property damage, personal injury, and wrongful death actions based on products liability theories as against aircraft manufacturers. *See, e.g.*, Restatement of Torts §§ 388, 394, 395 & 398 (1934); *Sebo v. United Air Lines, Inc.*, 10 F.R.D. 327 (S.D.N.Y. 1950); *Vrooman v. Beech Aircraft Corp.*, 183 F.2d 479 (10th Cir. 1950); *Smith v. Piper Aircraft Corp.*, 4 CCH Avi. 17,771 (1955); *Prasker v. Beech Aircraft Corp.*, 258 F.2d 602 (3d Cir.), *cert. denied*, 358 U.S. 910 (1958). *See, also*, cases cited in Annot., "Liability of Manufacturer or Seller for Injury Caused by Automobile or Other Vehicle, Aircraft, Boat, or Their Parts, Supplies or Equipment," 78 A.L.R.2d 460-588 (1961) §§ 36 & 37 at pp. 561-566; Annot., "Products Liability: Personal Injury or Death Allegedly Caused by Defect in Aircraft or Its Parts, Supplies, or Equipment," 97 A.L.R.3d 627-677 (1980 & Supp.); cases cited at Ptn. App. 7a. Thus, Piper's preemption argument constitutes radical tort reform abolishing existing state common law tort compensation for aircraft accident victims, a result contrary to Congress' stated intent.

III.

NO REVIEWABLE CONFLICT EXISTS; ALL CIRCUITS CONSIDERING THE ISSUE AFTER *MORALES* ARE AGREED THAT STATE COMPENSATION EXISTS.

Since *Morales*, all federal circuits considering the issue have uniformly held that aircraft manufacturers may be held liable to aircraft accident victims for compensatory damages awarded based on state products liability laws. In addition to the Tenth Circuit Opinion at issue (Ptn. App. 2a-25a), in *Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291, 294-295 (11th Cir. 1993) the Eleventh Circuit held that the Federal Aviation Act of 1958 does not pre-empt state common law compensation of aircraft accident victims. *See, also, Sunbird Air Services, Inc. v. Beech Aircraft Corp.*, 789 F. Supp. 360 (D. Kan. 1992) (aircraft owners' class action against aircraft manufacturer based on defective design of aircraft component). In *West v. Northwest Airlines, Inc.*, 1993 U.S. App. LEXIS 12997 (9th Cir. June 3, 1993), on dissimilar facts, the Ninth Circuit also held that an airline

passenger bumped from a scheduled airline flight because the air carrier overbooked the flight could sue the air carrier for breaching Montana's covenant of good faith and fair dealing.

Contrary to Piper's position, minimum federal design safety standards and state common law victim compensation are not mutually exclusive. As explained in Steven Shavell, *Economic Analysis of Accident Law* (Harv. U. Press 1987) at 285-286 (boldface added):

> "*Joint use of approaches.* . . . For example, ... **joint use of regulation and liability will be advantageous. Specifically, it will be desirable for parties to satisfy minimal safety standards and also to face possible liability.** Insisting on minimal safety standards — those that the authority can be reasonably confident are needed . . . despite its imperfect information — will ensure that at least certain precautions will be taken even by parties who, because their assets are low, would not be led to meet the standards by the threat of liability. On the other hand, the threat of liability will induce parties whose assets are not low to take additional precautions that they, but not the regulator, recognize will reduce risk . . ."

Having permitted federal regulators to repose expertise and enforcement in the aircraft manufacturers via the delegation option, 14 C.F.R. 21.231 et seq. *(see, United States v. S.A. Empresa de Viaco Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 816-817 (1984)), Congress chose to retain state tort liability to compensate aircraft accident victims. 49 U.S.C. App. § 1506.

CONCLUSION

For these reasons, the petition should be denied.

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APPENDIX

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"TITLE 49 APPENDIX — TRANSPORTATION
CHAPTER 20 — FEDERAL AVIATION PROGRAM
SUBCHAPTER I — GENERAL PROVISIONS

§ 1305 Federal preemption

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation."

49 U.S.C. App. § 1305(a)(1) (1984).

"TITLE 49 APPENDIX — TRANSPORTATION
CHAPTER 20 — FEDERAL AVIATION PROGRAM
SUBCHAPTER XI — MISCELLANEOUS

§ 1506 Remedies not exclusive

"Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

49 U.S.C. App. § 1506 (1958).